

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35141

STATE OF IDAHO,)	2009 Unpublished Opinion No. 674
)	
Plaintiff-Respondent,)	Filed: November 13, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
KARL JAMES MUSICK, JR.,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Thomas F. Neville, District Judge.

Judgment of conviction and sentence for aggravated battery, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah Elizabeth Tompkins, Deputy Appellate Public Defender, Boise, for appellant. Sarah Elizabeth Tompkins argued.

Hon. Lawrence G. Wasden, Attorney General; John Charles McKinney, Deputy Attorney General, Boise, for respondent. John Charles McKinney argued.

GRATTON, Judge

Karl James Musick, Jr. appeals his conviction for aggravated battery claiming relevant evidence was excluded prejudicing his defense. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

At about 10:30 p.m. Daniel Forrey and friends stood on a downtown street corner. Karl Musick stopped the car he was driving at the corner for a red light. In the car with Musick were his fiancée, an infant in a car seat and another male passenger. Forrey yelled racist and disparaging comments at Musick, who is Hispanic. Forrey and his friend both later testified that Forrey was yelling from the sidewalk when Musick got out of his vehicle to yell back at Forrey. Forrey testified there was no physical contact in this encounter and he stayed on the sidewalk. Forrey's friend testified that Forrey and Musick were arguing in a parking space near the curb but that there may have been some pushing, although no punches. They both testified that

Musick returned to his vehicle and drove away, at which time Forrey's friend left the corner. Subsequent events were described by another witness from the other side of the street who testified that soon thereafter two Hispanic men walked up behind Forrey. One of the men hit Forrey in the back of the head with a small bat, and then both of them ran in the same direction from where they came.

Musick also testified that Forrey approached the car, yelling. However, Musick testified that Forrey tried to open Musick's door and then moved to the door where the infant was sitting. Musick testified he feared for the safety of the baby, grabbed a short bat from the back seat, and got out of the car with the other male passenger. Musick's fiancée, in fear for the infant's safety, climbed into the driver's seat and drove away. Musick testified he and his friend were faced with a group of five people and, after Forrey pushed him, he hit Forrey in the head with the bat and ran.

A few minutes after the altercation an officer recorded an interview with Forrey. On the tape, Forrey stated: "I hate Mexicans. They come out of nowhere and jump you from behind."

Musick was charged with aggravated battery under Idaho Code §§ 18-903(b) and 907(b). Musick admitted hitting Forrey with a bat but argued self-defense. The prosecution sought to exclude the use of Forrey's taped statement through a motion in limine. The trial court granted the motion, precluding use of the taped statement. The jury found Musick guilty of aggravated battery.

II. ANALYSIS

Musick argues the trial court committed reversible error in excluding the taped statement. Musick defended his action as justified self-defense, claiming Forrey was the initial aggressor.¹ He argues the taped statement was relevant because it: (1) showed Forrey's motive to be the initial aggressor; (2) impeached Forrey's statements at trial; (3) demonstrated the *res gestae* of the events; (4) could have refreshed Forrey's recollection; and, (5) showed pertinent traits of Forrey's character. Musick also contends that the trial court erred in alternatively excluding the

¹ While Musick also now labels his claim as a violation of his constitutional right to confront adverse witnesses and to present a defense, Musick argued his claim in the district court under the rules of evidence. Nevertheless, the conclusion reached herein equally applies to any constitutional claim.

taped statement under Idaho Rule of Evidence 403. Finally, he asserts that the erroneous exclusion of the evidence was prejudicial.

We review questions of relevance de novo. *State v. Raudebaugh*, 124 Idaho 758, 764, 864 P.2d 596, 602 (1993). “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Idaho Rule of Evidence 401. Unless there is an exclusionary rule, all relevant evidence is admissible. I.R.E. 402.

We need not analyze each of the separate grounds asserted by Musick as to the relevance of the taped statement. At oral argument, the State conceded that based upon the development of the evidence during trial, particularly Musick’s testimony that Forrey pushed him, the taped statement became at least marginally relevant on the issue of motive. Idaho Rule of Evidence 404(b) generally bars the use of evidence of other crimes, wrongs, or acts to prove a person acted in conformity with that character. However, the same evidence may be admissible to prove motive.

Musick claims that the taped statement was admissible under I.R.E. 404(b) as evidence of motive on Forrey’s part to be the initial aggressor. The district court denied admission of the taped statement largely because, since the statement was made after the altercation, it was not something that Musick had heard. The trial court stated: “They [the taped statements] were not made to or in the presence of the defendant and could not, therefore, have affected the defendant’s perception of danger or the need for self-defense.” Musick argues the trial court erred because he was not required to have knowledge of Forrey’s racial animus in order for evidence of his racial animus to be admissible to prove motive.

A defendant does not necessarily need to know a fact for it to be relevant in proving a victim was the initial aggressor. *State v. Hernandez*, 133 Idaho 576, 584, 990 P.2d 742, 751 (Ct. App. 1999). In *Hernandez*, the defendant was prosecuted for repeatedly stabbing the victim during a fight. *Id.* at 579-80, 990 P.2d at 745-46. The defendant argued self-defense and attempted to offer evidence of the victim’s reputation for violence. *Id.* at 583, 990 P.2d at 749. The trial court barred the evidence because the defendant did not have personal knowledge of the victim’s character. *Id.* This Court held that the defendant need have knowledge only if the evidence is offered to prove the defendant’s reasonable belief that force was necessary to repel the victim’s attack. *Id.* at 584, 990 P.2d at 750. Otherwise, the defendant’s knowledge of such

fact does not change the likelihood that the victim was the aggressor. *Id.* at 584, 990 P.2d at 751. Thus, in the context of a self-defense claim, if the evidence has some relevance as to whether the victim had a motive to be the initial aggressor, then the defendant need not have prior knowledge of such fact.

Because the taped statement bore some marginal relevance, we conclude that the district court erroneously excluded the evidence.² However, error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* Thus, we examine whether the alleged error complained of in the present case was harmless. *See State v. Lopez*, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005). An error is harmless if the reviewing court determines, beyond a reasonable doubt, that the jury would have reached the same result. *State v. Gomez*, 137 Idaho 671, 673, 52 P.3d 315, 317 (2002). If the error concerns omitted evidence, prejudice exists when “there is a reasonable possibility that the lack of excluded evidence contributed to the verdict.” *Id.* In *State v. Woodbury*, 127 Idaho 757, 761, 905 P.2d 1066, 1070 (Ct. App. 1995), evidence was improperly admitted but determined to be largely repetitive of properly admitted evidence and, therefore, harmless. *Id.* at 758-61, 905 P.2d at 1067-70. Here, the evidence was improperly omitted, but, similarly, would have been repetitive of evidence already properly admitted and, therefore, the exclusion was harmless.

Evidence of Forrey’s aggressiveness and unprovoked racist remarks was before the jury. Musick, Musick’s fiancée, and Forrey’s friend all testified regarding Forrey’s aggression and that Forrey yelled racist remarks to Musick. Forrey himself testified that he was “being racist” and “yelling racist things.” The taped statement (“I hate Mexicans. They come out of nowhere and jump you from behind.”) evidences racial animus and could imply a desire to act aggressively towards Musick. However, the taped statement, and its implications regarding racial animus and motive, would have been repetitive of properly admitted testimony from several witnesses. Accordingly, Musick has not shown that the lack of the excluded evidence contributed to the jury verdict. Thus, any error was harmless.

² The district court, while maintaining that the evidence was irrelevant on all grounds, alternatively ruled that if the statement had some relevance it was cumulative of other evidence, unhelpful and otherwise potentially confusing to the jury and, thus, excludable under I.R.E. 403. Musick challenges this determination. However, we need not decide this issue as we hold that exclusion of the evidence was harmless error.

III.
CONCLUSION

Musick failed to demonstrate that he suffered prejudicial error when the trial court excluded Forrey's taped statement. The judgment of conviction and sentence entered thereon are affirmed.

Chief Judge LANSING and Judge Pro Tem PERRY, **CONCUR.**